Filed 5/11/16 In re H.M. CA1/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re H.M., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. H.M., Defendant and Appellant.	A143339 (Alameda County Super. Ct. No. SJ10016092-01)

Appellant H.M. was the subject of multiple juvenile wardship petitions alleging he committed a total of 20 crimes between the ages of nine and twelve. (Welf. & Inst. Code, § 602.)[1] After being found incompetent to stand trial on several occasions, the juvenile court found him competent following a contested hearing held when he was 13 years old. (See § 709.) Appellant admitted two felony counts in exchange for a dismissal of the remaining charges and special allegations, after which he was removed from his mother's custody, committed to the custody of the probation officer, and placed in an out-of-state facility. He contends: (1) the juvenile court applied the wrong legal standard in finding him competent and erred in rejecting an expert's opinion he was incompetent; (2) the court did not follow the procedures required for an out-of-state placement; (3) the court should have made findings and issued orders regarding appellant's special education

[1] Further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

needs; (4) the court should have specified appellant's maximum term of confinement in the dispositional order and should correct the custody credits ordered and the restitution fine imposed; (5) certain probation conditions were unconstitutionally vague and overbroad and must be modified; and (6) clerical errors in the minute orders and dispositional reports must be corrected. We uphold the orders determining appellant to be competent and committing him to an out-of-state facility, but remand the case for a recalculation of credits, the filing of a required form, a reconsideration of the challenged probation conditions, and the correction of clerical errors as appropriate.

I. FACTS AND PROCEDURAL HISTORY

A. *Overview*

Appellant was born in February 2001. His mother has a total of five children and a history of depression. His father was physically abusive to his mother before leaving the home. From preschool forward, appellant has been physically aggressive with other students and teachers, and has difficulty paying attention and learning. He has performed poorly on IQ and other standardized tests and was given an individualized education program (IEP) based on a qualifying disability of severe emotional disturbance. Appellant has been diagnosed with mental health conditions and has taken medication for those conditions to improve his behavior. As will be seen below, he began engaging in criminal conduct at an early age, leading to the proceedings in this case.

B. *Original § 602 Petition and First Amendment to Petition (Counts 1-11)*

On October 5, 2010, San Leandro Police Department officers were dispatched to a gas station where a man reported that several juveniles had shot at his car and attempted to take it from him. Officers detained appellant, who was then nine years old, along with two other youths, all of whom had been riding bicycles recently stolen from Walmart. On October 26, 2010, appellant and two other youths took bicycles from Walmart and rode them in a park in Oakland, where they evaded a park officer. On the evening of December 7, 2010, appellant stole a car using scissors to start the ignition.

The Alameda County District Attorney filed a wardship petition on December 9, 2010, bringing charges against appellant based on the October 5 and December 7

incidents: felony vehicle theft (Veh. Code, § 10851, count 1), misdemeanor receiving stolen property (Pen. Code, § 496, count 2), misdemeanor possession of a burglar's tool (Pen. Code, § 466, count 3), misdemeanor driving without a license (Veh. Code, § 12500, subd. (a), count 4), misdemeanor exhibiting a replica firearm in a threatening manner (Pen. Code, § 417.4, count 5), felony assault with a BB gun by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1), count 6), felony receiving stolen property (Pen. Code, § 496, count 7) and misdemeanor petty theft (Pen. Code, § 484, subd. (a), count 8). Appellant was released on informal home supervision with GPS monitoring.

On March 4, 2011, following appellant's 10th birthday, the district attorney filed an amendment to the original petition to add three misdemeanor allegations arising from the October 26, 2010, incident: second degree burglary (Pen. Code, § 459, count 9), petty theft (Pen. Code, § 484, subd. (a), count 10) and resisting arrest (Pen. Code, § 148, subd. (a) count 11).

On March 12, 2012, appellant was placed on a hold under Welfare and Institutions Code section 5150 based on his unsafe behavior. On March 16, 2011, the court declared a doubt as to appellant's mental competence, suspended juvenile proceedings and ordered a competency evaluation. Prosecution of the charges was ordered deferred.

C. *April 2011 Competency Evaluation*

The court appointed clinical psychologist Janice Thomas, Ph.D., to evaluate appellant's mental competency. In a report filed April 11, 2011, Dr. Thomas concluded appellant was not competent to stand trial "due to a combination of factors, including developmental immaturity, mental disorder, and low IQ, and which individually are detrimental but in combination cause significant functional deficits." Her report noted appellant had been exposed to a number of traumatic events, including domestic violence between his father and mother, a hospitalization for a blood infection when he was three months old, the carjacking of his mother, the burglary and vandalizing of the family home, the murder of a maternal uncle, and a 2010 motor scooter accident resulting in a head injury.

According to Dr. Thomas, appellant had symptoms of attention deficient hyperactivity disorder (ADHD), mood disorder, and posttraumatic stress disorder (PTSD). Since being detained, he had been given Abilify and Adderall, which he reported were helping. In addition to his criminal offenses, appellant had left his home while on house arrest and violated the terms of his GPS monitoring. He had been terminated from the GPS program and suspended from his school after setting off the fire alarm and assaulting school staff.

Appellant had an IEP through the Oakland Unified School District, based on a qualifying disability of emotional disturbance. He had tested in the average range for verbal abilities and the below average range in nonverbal abilities, spatial abilities and working memory ability. His results on standardized intelligence tests showed he was functioning in the "Borderline to Low Average" range. Dr. Thomas administered the Juvenile Adjudicative Competence Interview (JACI), a structured interview format designed to obtain information about a youth's abilities in 12 areas relevant to competency to stand trial. Appellant's legal knowledge and experience was limited. Dr. Thomas recommended that appellant receive neuropsychological testing based on the head injury he had received during the scooter accident in 2010.

D. *Second Amendment to Petition (Counts 12-13)*

With legal proceedings suspended, appellant returned to his mother's home unsupervised by GPS or probation. His mother advised the probation officer in June 2012 that appellant was refusing to attend school, and she requested a residential placement for him. On July 29, 2012, appellant and five or six other youths entered an occupied home through a window and took some valuables. One of the boys pointed what appeared to be a replica firearm at the occupant, who gave him $200.

On July 31, 2012, the district attorney filed a second "first amendment" to the wardship petition adding felony counts of "home invasion robbery in concert" (Pen. Code, § 211, count 12) and first degree residential burglary (Pen. Code, § 459, count 13), accompanied by allegations a principal was armed with a firearm (Pen. Code, § 12022, subd (a)(1)). On August 17, 2012, appellant admitted the home invasion robbery in

exchange for a dismissal of all other pending counts and allegations. The court ordered a mental health evaluation.

On September 4, 2012, Dr. Thomas filed a report that did not explicitly address competency (the court having not requested a competency evaluation per se), but described mental deficits and behavioral issues similar to those outlined in her previous competency evaluation. The trial court granted defense counsel's motion to withdraw appellant's admission of the robbery allegation and ordered a supplemental competency evaluation.

E. *November 2012 Competency Evaluation*

On November 6, 2012, Dr. Thomas filed a supplemental report in which she concluded appellant remained incompetent to stand trial, noting "[n]ot only is [appellant] very young relative to other youth in the delinquency system, but he also has severe mental disabilities and limited cognitive functioning . . . . [Appellant]'s competency-related deficits are due to a combination of co-morbid mental disorders (Mood Disorder Not Otherwise Specified, Posttraumatic Stress Disorder, and Attention Deficit Hyperactive Disorder), low IQ, and developmental immaturity." Dr. Thomas noted appellant's performance on standardized tests showed his cognitive functioning to be lower than it had been when he was tested previously. The court found appellant incompetent to stand trial in a proceeding held December 5, 2012.

On January 14, 2013, Dr. Thomas filed a plan for assisting appellant in obtaining competency. (See § 709, subd. (c).) The report noted appellant had been released to his mother the previous month after spending time in juvenile hall and he had been placed on GPS monitoring and home supervision. Appellant was taking medication (Adderall and Abilify) and had an interview with the Spectrum Center regarding his educational needs.

F. *Violation of Probation and Amendment to § 602 Petition (Count 14)*

On January 24, 2013, the district attorney filed a petition alleging appellant had violated the terms of his release by tampering with his GPS device and leaving home. On January 27, appellant and three older teens burglarized a home, with appellant acting as a lookout while the others went inside. On January 31, the district attorney filed a third

"first amendment" to the original wardship petition adding a felony charge of residential burglary. (Pen. Code, § 459, count 14.)

G. *March 2013 Competency Evaluation and Follow-Up Evaluations*

The court ordered another competency evaluation and on March 19, 2013, Dr. Thomas submitted a report concluding appellant, who had turned 12 the previous month, remained incompetent even though he had made "noticeable gains in factual understanding." Dr. Thomas was optimistic appellant's competency-related deficits could be remediated: "[Appellant] has already made substantial gains in his competency-related abilities. As he continues to mature, he is expected to make further gains. Moreover, as he ages, his overall cognitive functioning will improve despite being in the low end of the IQ spectrum relative to his same age peers. [¶] Many of the stressors and traumatic events which have plagued his adjustment in the past might well remit with the continued assistance of various agencies and with his mother's continued vigilance. For example, he is now living in a safer neighborhood, and his father will soon be served with a Temporary Restraining Order."

On July 16, 2013, the court ordered an evaluation to determine whether competency had been restored along with a neurological evaluation. Pediatric neurologist Robin Shannon, M.D. examined appellant and found his responses and the results of an electroencephalogram (EEG) to be within normal limits. Though appellant reported memory problems after his 2010 scooter accident, appellant's medical records indicated his head injury had not been severe, and was possibly not even a concussion. "[I]t is hard to blame a dramatic personality change on his head injury back in September 2010."[2]

[2] Prior to receiving the report from Dr. Shannon, child psychiatrist Brian Kleis, Ph.D., advised the probation officer that in light of the normal EEG, the diagnosis best fitting appellant was "Personality Change Due to Significant Head Injury, Combined Type" (Labile, Disinhibited, and Aggressive features). Dr. Kleis believed appellant did not have a personality disorder, but a mental disorder due to a medical condition.

In a report submitted August 5, 2013, Dr. Thomas concluded appellant had not yet been restored to competency but was progressing in that direction: "[Appellant] has made some progress towards restoration. For example, he appears to be more knowledgeable of the court proceedings than he has at any time previously. Nevertheless, it is my opinion that at the present time, he has not been restored and that competency-related deficits have not been adequately remediated. [¶] This is not to say he is un-restorable. To the contrary, his improved adjustment over the course of this detention shows that he is capable of improved social, emotional, and behavioral functioning. Moreover, as he matures, he will progress as well."

H. *Subsequent § 602 Petition and December 2013 Competency Evaluation*

On September 26, 2013, appellant punched a classmate at the Spectrum School and kicked and shattered the windshield of the principal's car. A subsequent wardship petition was filed alleging appellant had committed misdemeanor counts of vandalism (Pen. Code, § 594, subd. (b)(2)(A), count 1) and battery on school grounds (Pen. Code, § 243.2, count 2). The court ordered a competency evaluation and on December 17, 2013, Dr. Thomas filed a report concluding appellant was incompetent and was unlikely to be restored to competency within the foreseeable future: "The persistence of [appellant]'s cognitive deficits in interaction with the severity of his mental disorder leads me to conclude that he is unlikely to be restored [to competency] within the foreseeable future. Although his abilities will improve with age, the improvement is expected to be marginal and insufficient to meet a constitutionally adequate standard of competency. [¶] Because of his cognitive and social/emotional deficits, he will continue to be slow to process information, slow to understand words and concepts, and compromised whenever mental effort, attention, and concentration are required. His mental disorder will be easier to remediate than his cognitive impairment, but that is not to say that remediation for his mental disorder is either likely or foreseeable." She described his poor performance on several tests and noted his full scale IQ was currently 58.

I. *Second Subsequent § 602 Petition*

On February 10, 2014, appellant and three other boys flagged down a passing driver. Two or more of them punched her, one took her backpack, one pointed a small handgun at her, and they all got inside her car. Appellant drove the car away, evading police who responded and eventually spinning out and colliding with a parked car before coming to a stop. A second subsequent wardship petition was filed on that same date charging appellant with felony counts of carjacking (Pen. Code, § 215, count 1), robbery (Pen. Code, § 211, count 2), receiving stolen property (Pen. Code, § 496, count 3) and evading a peace officer (Veh. Code, § 2800.2, count 4). Proceedings were suspended as to these new charges and a competency evaluation was ordered.

J. *Competency Evaluations*

1. Dr. Thomas

Dr. Thomas filed a report on March 25, 2014 in which she concluded appellant remained incompetent. She described appellant as an "emotionally disturbed youth whose emotional disturbance is manifest primarily as a behavioral disorder" leading him to conflict regardless of whether he was at home, in school, in the community or in juvenile hall. She noted his various diagnoses of Mood Disorder, ADHD, PTSD and Personality Change due to Head Trauma, and she believed he currently met the criteria for Disruptive Mood Dysregulation Disorder, a diagnosis used to describe individuals with severe, recurrent temper outbursts grossly out of proportion with the provocation. Appellant had a low IQ and was mentally impaired, but did not meet the diagnostic criteria for "Intellectual Disability" because his daily living skills were not significantly impaired.

Dr. Thomas concluded appellant was developmentally immature: "Although [he] is cognitively, psychologically, socially, and behaviorally impaired, paramount to the question of competency is his developmental immaturity. As he intellectually matures, for example, he will become more intelligent than he is now, although he will still in all probability be at the low end of the spectrum relative to his peers. [¶] However, separate and apart from emerging intelligence is his existing, immature reasoning. He focuses on

short term rewards and fails to appreciate long-term consequences. This is a developmental phenomenon which is characteristic of teenagers but which improves throughout adolescence. [¶] Nowhere was his developmental immaturity more evident than when he showed he was unable to tolerate two weeks of GPS even when given the incentive to be released from GPS should he be successful. He instead 'chose' the temporary relief of leaving home instead of the long-term reward of getting off GPS and staying out of juvenile hall."

With respect to her opinion regarding appellant's incompetency to stand trial (which did not take public safety into account), Dr. Thomas stated: "[T]he data converge to support the conclusion that [appellant] is a developmentally immature, mentally disordered, behaviorally dysregulated, cognitively impaired early adolescent, and that these conditions directly cause deficits in competency-related abilities. Although [appellant] does not have the level of functioning necessary to be competent to stand trial, he does meet the much lower standard of being able to violate the rights of others, deceive, and manipulate."

2. Dr. Soulier

The prosecution retained forensic psychiatrist Matthew Soulier to offer an opinion regarding appellant's competency. Dr. Soulier interviewed appellant, administered the JACI, and reviewed the court records, medical records and previous psychological reports and competency evaluations.

In a report prepared April 29, 2014, Dr. Soulier explained he did not find appellant to be intellectually disabled because, while his intelligence was "significantly below average," his adaptive functioning was higher than reflected on his intelligence tests. Appellant had "garnered multiple psychiatric diagnoses," but Dr. Soulier did not believe they were "especially helpful to understand his poor behaviors. . . ." In Dr. Soulier's opinion, appellant's mental pathology was best explained by sociopathy and trauma, and he was at a high risk of reoffending. He had some developmental immaturity, but his limitations were probably more the result of psychopathology. Appellant was capable of

understanding the nature of delinquency proceedings, and he was able to assist his counsel in conducting his defense in a rational manner.

In support of his conclusion appellant was able to understand the nature of the delinquency proceedings, Dr. Soulier noted: appellant (1) was able to describe his charges, realistically compare the severity of the varying charges, and give a logical account of his behavior underlying the charges; (2) understood the purpose and nature of a trial; (3) understood the functions of the different participants in a trial (the prosecutor, defense attorney, and judge); (4) articulated how a judge determines guilt and understood a judge is impartial and weighs the evidence presented by the prosecutor and defense attorney; (5) understood his attorney served as his advocate; (6) understood he had the right to plead not guilty even if he did what the police said he did; (7) understood the difference between pleading guilty and not guilty; (8) correctly identified evidence; (9) understood probation and the role of the probation officer; and, (10) with education from Dr. Soulier, understood the basic mechanics of a plea bargain and the role of risk in deciding whether to accept such a bargain.

In support of his conclusion appellant was capable of assisting his counsel in a rational manner, Dr. Soulier noted appellant (1) was cooperative and respectful throughout the interview and could maintain proper behavior in the courtroom; (2) appreciated the purpose, advantages, and disadvantages of a plea bargain and would be able to assist counsel in rationally making a decision about a plea bargain; (3) perceived his attorney to be his advocate and articulated how he (appellant) could be helpful; (4) was able to assimilate new facts and information and process information in a rational manner; (5) during his interview with police about the most recent charges, was able to discuss his choices, behavior and the conduct of others despite the complexity of the offense; and (6) during that same interview, minimized his own participation and emphasized the more serious roles of his cohorts, suggesting he understood the value of minimizing responsibility in the context of the adversarial system.

K. *Competency Hearing*

A contested competency hearing was held in June 2014. Dr. Thomas was called as a witness by appellant, Dr. Soulier was called as witness by the prosecution, and the court received the reports of both evaluators into evidence. Much of the questioning concerned the interpretation of appellant's responses to the JACI, which both evaluators agreed was the central component of a juvenile competency evaluation. The JACI is not a validated test and has no score or right answers, but provides evaluators with guidelines for conducting interviews and making subjective assessments of juveniles.

Dr. Thomas did not believe appellant's answers to the JACI questions showed he had an understanding of the trial process or its participants. She acknowledged appellant had made progress in certain areas, and that minors who are illiterate (as was appellant) could understand vocabulary, legal concepts and court procedures. During the JACI she administered in March 2014, appellant had correctly defined a plea, articulated a range of punishments, stated the roles of the parties in court, understood he did not have to incriminate himself, and described evidence that might be offered in court, such as fingerprints.

Dr. Soulier testified he had found appellant to be relaxed, polite and cooperative during his interview. Appellant had accurately recounted significant events in his life and his arrest history, and was aware he had been diagnosed with certain mental disorders. During the JACI administered by Dr. Soulier, appellant had "no difficulty" describing the charges against him and, though he was not immediately able to differentiate between a felony and a misdemeanor, he was able to do so after Dr. Soulier educated him on this point. When asked what he had done that was particularly "bad," appellant cited the carjacking, but also noted the victim was having trouble identifying him, which might help his case. Appellant knew the purpose of a trial was to "figure out if you're guilty or not." Dr. Soulier sketched out a courtroom to explain the various parties and procedures, and appellant was able to describe the process, showing he could learn new material and concepts. Dr. Soulier also educated appellant on the concept of a plea bargain, after which appellant indicated his public defender and the district attorney would have a

chance to make a plea bargain, and if that bargain was rejected he would go to a trial where a judge would determine whether he was innocent or guilty. Appellant understood he would have a public defender advocating for him and explained a guilty plea meant "to admit that you did the crime," after which the judge would give him a sentence. Appellant understood he could plead not guilty even if he did commit the crime, a concept immature youths often have trouble grasping. Asked to imagine his attorney was asking him to say what had happened when he was arrested and why the attorney might want that information, appellant said "the police report might be lying," indicating he understood the public defender would be seeking a different perspective on the events than that offered by the police. Appellant was not initially aware of his right against self-incrimination, but understood the concept when educated.

Dr. Soulier had studied under Dr. Thomas Grisso, the developer of the JACI. He noted one of the instructions within the JACI was to educate a juvenile when deficiencies in competency are discovered, because a competent juvenile should be able to learn new concepts and make use of the information. One of his "small critiques" of Dr. Thomas was that her reports did not indicate she had been educating appellant; also, because she had done multiple evaluations and always reached the same conclusion "one could wonder if a bias is starting to develop." Dr. Soulier acknowledged Dr. Grisso had written that an evaluator must test a minor's retention of information during a second interview, but believed it was unrealistic to go back to juvenile hall to interview appellant in the three areas where he (Dr. Soulier) had provided education (plea bargaining, self-incrimination, difference between a felony and a misdemeanor).

The prosecution also presented the testimony of Gwen Estes, one of appellant's teachers in juvenile hall. She testified that although his behavior was extremely poor when he came to her, he was now learning to regulate his behaviors in class.

The court ruled appellant was competent to stand trial. "He is currently 13—almost 13-and-a-half. And although he has significant learning difficulties, and I get that and you understand that, I do not find that he is intellectually disabled. [¶] His I.Q. has varied between 58 and 75. He does not meet the criteria for the Regional Center services.

And I do find that at this time that he does have the present ability to consult with his lawyer with a reasonable degree of rational understanding and factual understanding of the proceedings against him."

L. *Admission and Disposition*

After the court determined he was competent to stand trial, appellant admitted the robbery and burglary alleged in the second amendment to the original petition (counts 12 and 13). The district attorney dismissed the remaining counts and allegations pursuant to a plea agreement. At the dispositional hearing, appellant was removed from his mother's custody and was ultimately placed in the George Jr. Republic group home in Pennsylvania.

II. DISCUSSION

A. *Court's Finding of Competency*

Appellant challenges the juvenile court's order finding him to be competent in two respects. First, he argues, the court improperly presumed he was competent even though he had been previously found incompetent. Second, he contends the competency determination was not supported by substantial evidence. We disagree.

1. General Principles

A minor who is the subject of a wardship petition, like an adult facing criminal charges, has a due process right not to be tried while mentally incompetent. (*In re R.V.* (2015) 61 Cal.4th 181, 185 (*R.V.*).) This right was not originally codified in the statutes governing delinquency proceedings, but was recognized in case law and memorialized in the Rules of Court. (*Id*. at pp. 188–191 [summarizing evolution of rules regarding juvenile competency].) Case law regarding juvenile competency frequently borrowed from Penal Code section 1367 et seq., the statutes governing mental competency in adult criminal proceedings. (*Id*. at pp. 189–190.)

In 2010 the Legislature enacted section 709, which establishes the procedures for juvenile competency proceedings: "(a). . . [A] minor is incompetent to proceed if he or she lacks sufficient present ability to consult with counsel and assist in preparing his or her defense with a reasonable degree of rational understanding, or lacks a rational as well

as factual understanding, of the nature of the charges or proceedings against him or her."[3] A hearing is required when "substantial evidence raises a doubt as to the minor's competency" (§ 709, subds. (a) & (b)), and toward that end, the court must "appoint an expert to evaluate whether the minor suffers from a mental disorder, developmental disability, developmental immaturity, or other condition and, if so, whether the condition or conditions impair the minor's competency." (§ 709, subd. (b).) "If the minor is found to be incompetent by a preponderance of the evidence, all proceedings shall remain suspended for a period of time that is no longer than reasonably necessary to determine whether there is a substantial probability that the minor will attain competency in the foreseeable future, or the court no longer retains jurisdiction," during which time the court may order services to assist the minor in gaining competency. (§ 709, subd. (c).)

In an adult criminal proceeding, a defendant may be declared incompetent only if the inability to understand the proceedings or cooperate with counsel arises from a mental disorder or developmental disability. (Pen. Code, § 1367, subd. (a).) "As a matter of law and logic, an adult's incompetence to stand trial must arise from a mental disorder or developmental disability that limits his or her ability to understand the nature of the proceedings and to assist counsel. [Citation.] The same may not be said of a young child whose developmental immaturity may result in trial incompetence despite the absence of any underlying mental or developmental abnormality." (*Timothy J. v. Superior Court* (2007) 150 Cal.App.4th 847, 860.) Thus, a juvenile need not show that the inability to understand or assist arises from a mental disorder or disability, and may be found incompetent based solely on developmental immaturity. (*Id*., at pp. 860–862.) Section 709, subdivision (c) recognizes as much. (*Bryan E. v. Superior Court* (2014) 231 Cal.App.4th 385, 391.)

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[3] This is the standard of incompetency set forth by the United States Supreme Court in *Dusky v. United States* (1960) 362 U.S. 402.

2. Presumption of Competency

Appellant's argument that the court erred in presuming him competent is untenable in light of our Supreme Court's recent decision in *R.V.*, *supra*, 61 Cal.4th 181, which was issued after the opening brief was filed in this case. In *R.V.*, as here, the issue was whether the juvenile court had correctly presumed a juvenile defendant to be competent in a hearing held after a doubt had been declared as to his competency to proceed. (*Id*. at pp. 186–188.) Unlike the adult competency statutes which expressly provide that a defendant is presumed competent (Pen. Code, § 1369, subd. (f)), section 709 is silent on that point. (*Id*. at p. 189.) The *R.V.* court conducted a thorough analysis of section 709 and its legislative history and underlying policy, as well as the case law and rules of court that had preceded it. (*Id*. at pp. 188-198.) It concluded "the most straightforward reading of the text of section 709 is that the minor is presumed competent." (*Id*. at p. 193.)

Seeking to avoid the effect of *R.V.*, appellant argues the decision applies only to an initial competency hearing, and once a juvenile has been found *in*competent as he was in this case, he is presumed to remain incompetent until proven otherwise. We do not agree.

Because section 709 does not set forth an express presumption concerning the competency of a juvenile who has been previously found incompetent, it is appropriate to look to the statues governing competency in adult criminal cases. (*R.V.*, *supra*, 61 Cal.4th at p. 194 ["we discern nothing in the legislative materials [of § 709] from which to infer that lawmakers intended to alter juvenile courts' existing practice of relying on adult competency provisions in other respects"].) An adult defendant who is found incompetent will be presumed competent when he is returned to court for another hearing on that issue, whether or not he has been certified competent by a specified mental health professional. (§§ 1369, subds. (a), (b)(2) & (f), 1372; *People v. Rells* (2000) 22 Cal.4th 860, 866–868 (*Rells*).) This is so despite the existence of the previous finding of incompetence. "The presumption that the defendant is mentally competent unless he is proved by a preponderance of the evidence to be otherwise is applicable at a trial of the defendant's mental competence, *in spite of the fact that it may run counter to any doubt*

expressed by the court and supported by the opinion of his own counsel. This presumption is applicable as well at a retrial of the defendant's mental competence, which is mandatory when the defendant has been committed for 18 months and remains so without a certificate of restoration to mental competence filed by a specified mental health official, *in spite of the fact that it is inconsistent with his apparent* non*recovery of mental competence*. Therefore, in our view, this presumption should be understood to be applicable at a hearing on the defendant's recovery of mental competence, *where it conforms in fact with the certificate of restoration. . . .*" (*Rells*, at p. 867.)

Because a mental defect or developmental disability is a prerequisite for an incompetency finding in an adult criminal case, an adult defendant coming before the court under the circumstances noted by *Rells* will have been previously determined to suffer from a such a condition. (Pen. Code, § 1367, subd. (a).) In many juvenile cases, including the one before us, the incompetency will arise at least in part from developmental immaturity, which is more transient in nature. If it is appropriate to presume a mentally ill or developmentally disabled adult defendant competent in a hearing to determine whether competency has been restored, that presumption would appear equally appropriate in a juvenile case.

We are not persuaded by appellant's reference to pending Assembly Bill No. 2695, which proposes various amendments to section 709.[4] Those amendments, if enacted, would not support appellant's suggestion it was inappropriate for the juvenile court to presume his competency during the proceedings at issue in this case. Among other things, the proposal would place on the minor the burden of proving competency at the initial hearing. (Assem. Bill No. 2695 (2015–2016 Sess.); proposed § 709, subd. (c).) If the minor were found incompetent, he or she would be provided services to remediate

[4] We grant appellant's request that we take judicial notice of Assembly Bill No. 2695, as amended April 19, 2016. We deny as unnecessary his request for judicial notice of the Judicial Council's Invitation to Comment on the same legislation, as well as the Alameda County Juvenile Competency Protocol and an excerpt from the book Evaluating Juveniles' Adjudicative Competence, a Guide for Clinical Practice.

that incompetency, subject to periodic review hearings at which a representative of the remediation program would determine the likelihood of the minor obtaining competency. (*Id*., subds. (f), (g)(1).) If the program's recommendation was that the minor had been remediated, the minor would have the burden of proving he or she remained incompetent; if the recommendation was that the minor was not able to be remediated, the prosecution would have the burden of proving the minor was remediable. (*Id*., subd. (g)(1).) In this case, appellant did not participate in a remediation program such as that contemplated by the amended version of the statute and there was no recommendation by such a program, following the provision of services, that appellant be deemed incompetent or incapable of being restored to competency. Rather, there were two opinions by qualified mental health professionals reaching different conclusions as to appellant's current competency.

Nor are we persuaded by appellant's suggestion a presumption of incompetency is required by Penal Code section 26, paragraph one, which provides that children under 14 are presumed incapable of committing a crime "in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness." A similar claim was rejected by the court in *R.V.*: "[A]lthough some of the same considerations may be relevant to both the question of competency to stand trial and the question of capacity to commit crime, these inquiries differ in their purpose and scope. [Citation.] [¶] . . . . [T]he presumption of competency arises only if the minor is subject to adjudication under the juvenile law, that is, only after the prosecution has overcome the presumption of incapacity with clear and convincing proof that the minor knew the wrongfulness of his or her conduct. The presumption of competency presents no inconsistency with a presumption of incapacity that has been rebutted." (*Id*. at pp. 197–198.)[5]

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[5] Appellant was eleven years old when he committed the crimes he admitted as part of the plea agreement. During the hearing at which the admission was taken, appellant acknowledged he knew his acts were wrongful at the time because his mother had told him not to take other people's belongings. (See *In re Tanya L.* (1977) 76 Cal.App.3d 725, 727–729 [12 year old appreciated wrongfulness of conduct in concealing stolen

3. Substantial Evidence

Appellant claims the order finding him competent was lacking in evidentiary support, the juvenile court having unreasonably rejected the opinion of Dr. Thomas. In evaluating this contention, we apply the deferential substantial evidence standard of review, viewing the record in the light most favorable to the order. (*R.V., supra*, 61 Cal.4th at pp. 198–200; *People v. Lawley* (2002) 27 Cal.4th 102, 131 (*Lawley*).) Because appellant was the party bearing the burden of proof on the competency issue, the precise question is whether the evidence compelled a finding of incompetency as a matter of law. (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528 (*I.W.*); see *In re Aurora P.* (2015) 241 Cal.App.4th 1142, 1163–1164.)

A juvenile court evaluating a minor's competency draws its conclusions "based on an appraisal of the particular expert testimony by mental health professionals, courtroom observations, and other testimonial and documentary evidence then before the court in the case." (*R.V.* at pp. 199–200.) Its determination "may be informed by the court's own observations of the minor's conduct in the courtroom generally, a vantage point deserving of deference on appeal." (*Id.* at p. 199.) When a court is faced with conflicting expert opinions regarding a defendant's competency, it must assess the weight and persuasiveness of those opinions and may credit the one it finds more persuasive. (*Lawley*, *supra*, 27 Cal.4th at p. 132.)

In this case, the juvenile court was presented with conflicting expert testimony regarding appellant's competency. Dr. Soulier and Dr. Thomas each provided a reasoned opinion grounded in facts, but the court found Dr. Soulier's to be more persuasive. Dr. Soulier had interviewed appellant personally, administered the JACI, and reviewed other materials associated with appellant's case. Although Dr. Thomas reached a contrary conclusion regarding competency, she acknowledged that appellant understood many important aspects of the legal process.

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credit cards used by her older sister]; *In re Jerry M.* (1997) 59 Cal.App.4th 289, 297–298 [finding of capacity under § 26, subd. one, may be implied rather than express].)

Appellant's evidence was not " 'uncontradicted and unimpeached' " or " 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding' " in his favor. (*I.W.*, *supra*, 180 Cal.App.4th at p. 1528.) Appellant's contention that the court should have rejected Dr. Soulier's opinion is little more than a request we reweigh the evidence. This we cannot do. (See *People v. Mercer* (1999) 70 Cal.App.4th 463, 466–467; *In re Brian R.* (1991) 2 Cal.App.4th 904, 918–919.)[6]

B. *Out-of-State Placement*

Appellant argues the trial court improperly issued an ex parte order placing him in an out-of-state facility without an adequate showing under section 727.1, subdivision (b)(1) that "[i]n-state facilities or programs have been determined to be unavailable or inadequate to meet the needs of the minor." He additionally challenges the order based on the lack of evidence showing the placement was the least restrictive available or the closest one to his family. We conclude he has forfeited these claims.

1. Procedural Background

In the report prepared for the dispositional hearing, the probation officer recommended an out-of-home placement, noting: (1) appellant comes from a "very chaotic and difficult family situation" in which his mother was raising five children as a single parent and his father had been physically abusive to both the mother and appellant; (2) appellant had been exposed to other violence and loss and engaged in very aggressive behavior himself; (3) appellant was concerned about his education, admitted he needed a change, and really wanted to learn how to read. The court had identified the George Jr. Republic facility in Pennsylvania as "an appropriate placement facility that can

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[6] This is not a case like *R.V.*, *supra*, 61 Cal.4th at pages 198–203, 217, in which the evidence before the juvenile court consisted of a single opinion of a qualified expert who concluded the minor was incompetent to proceed. In the absence of any infirmities in that opinion or countervailing facts, the juvenile court was held to have erred in rejecting the expert's uncontradicted testimony. (*Id.* at pp. 211–217; Cf. *People v. Mendoza* (2016) 62 Cal.4th 856, 878–883.)

adequately address the minor's behavioral, educational, developmental, emotional, substance abuse, social and recreational needs."

At the dispositional hearing held August 19, 2014, the court and the parties discussed the out-of-home placement recommendation. Defense counsel stated, "The one comment I have is that—I think the George Junior [p]roposal is a good one. I would like to see —I was looking at their materials and looking into it more, and there are a number of different ways that they—different programs there. And they try to shape their program to the needs of the particular minor. [¶] I think that it would probably be helpful to have a report from Dr. Thomas detailing the needs that she has seen [appellant] having. Just so they understand his history a little bit better, and can tell them what he has." The court agreed with counsel and asked the probation officer and Dr. Thomas to put together some materials regarding appellant's history to assist the service providers at George Jr.[7]

The court ordered appellant removed from the home of his mother and placed in a group home. It made findings under section 726, subdivision (a), that (1) appellant's parents had failed or neglected to provide proper maintenance, training or education for appellant; and (2) appellant's welfare required that custody be taken from his parents. The court additionally found reasonable efforts had been made to prevent or eliminate the need for removal, but it would be contrary to appellant's welfare to remain in his mother's home.

A multidisciplinary team meeting was held on August 26, 2014 (see § 706.6), at which time all parties agreed George Jr. Republic would be "a good fit" for appellant. On September 9, at the probation officer's request, the court issued an ex parte order approving the placement. The order stated: "Equivalent facilities for the minor are not available in California and institutional care in Pennsylvania is in the best interests of the minor and will not produce undue hardship." Appellant was accepted at George Jr.

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[7] Dr. Thomas subsequently submitted a letter with her recommendations to the court, which was filed on September 2, 2014.

Republic on September 17. Appellant was scheduled to leave for Pennsylvania on October 6, 2014.

2. Analysis

"The purpose of juvenile delinquency laws is twofold: (1) to serve the 'best interests' of the delinquent ward by providing care, treatment, and guidance to rehabilitate the ward and 'enable him or her to be a law-abiding and productive member of his or her family and the community,' and (2) to 'provide for the protection and safety of the public. . . .' " (*In re Charles G.* (2004) 115 Cal.App.4th 608, 614.) When a minor is removed from the custody of his parents, "family preservation and family reunification are appropriate goals." (§ 202, subd. (b).) Section 727.1 provides in relevant part: "(a) When the court orders the care, custody, and control of the minor to be under the supervision of the probation officer for foster care placement . . . the decision regarding choice of placement . . .shall be based upon selection of a safe setting that is the least restrictive or most family like, and the most appropriate setting that meets the individual needs of the minor and is available, in proximity to the parent's home, consistent with the selection of the environment best suited to meet the minor's special needs and best interests. . . .[¶] *(b) Unless otherwise authorized by law, the court may not order the placement of a minor who is adjudged a ward of the court on the basis that he or she is a person described by either Section 601 or 602 in a private residential facility or program that provides 24-hour supervision, outside of the state, unless the court finds, in its order of placement, that all of the following conditions are met: [¶] (1) In-state facilities or programs have been determined to be unavailable or inadequate to meet the needs of the minor*." (Italics added.)

Appellant does not appear to challenge the trial court's order removing him from his mother's home, but contends the court could not place him in an out-of-state facility such as George Jr. Republic in the absence of evidence regarding the availability of comparable placements inside California. He argues the placement in Pennsylvania infringed upon the parent-child relationship and the ex parte nature of the order approving the placement deprived him of due process.

These arguments have been forfeited by appellant's failure to object to the placement at George Jr. Republic when it was discussed at the dispositional hearing. Appellant's counsel was advised the probation department would be pursuing this placement and made no argument against it; to the contrary, counsel indicated he had reviewed the material regarding the George Jr. program and believed it to be a "good one." Having failed to press an argument for an in-state placement, appellant may not do so for the first time on appeal. (See, e.g., *People v. Scott* (1994) 9 Cal.4th 331, 352 (*Scott*); *In re Travis W.* (2003) 107 Cal.App.4th 368, 379.)

Appellant argues he should not be deemed to have forfeited the claim because the court's September 9, 2014 order approving the placement was issued ex parte and his attorney did not have an opportunity to object. We are not persuaded. Defense counsel acquiesced to the George Jr. placement at the dispositional hearing; the order issued on September 9 simply finalized a plan that had already been formulated and approved of by all the parties. Nor do we find merit in appellant's claim his attorney was ineffective in failing to object to the George Jr. placement. Ineffective assistance of counsel is established only when trial counsel's performance is deficient, i.e., when it "fell below an objective standard of reasonableness under the prevailing norms of practice." (*In re Alvernaz* (1992) 2 Cal.4th 924, 937.) Appellant's trial attorney vigorously litigated the issue of his client's competency, but, having lost that battle, believed the George Jr. program was the best hope for addressing appellant's myriad issues. Counsel's performance was not deficient.

C. *Compliance with Rule 5.651(b)(2)*

Appellant argues the case must be remanded for compliance with rule 5.651 of the California Rules of Court (rule 5.561), which requires the juvenile court to address and determine a child's general and special educational needs, identify a plan to meet those needs, and set forth findings on Judicial Council Form JV-535.[8] He relies on *In re*

[8] Rule 5.651(b)(2) provides: "At the dispositional hearing and at all subsequent hearings described in (a)(2), the court must: [¶] (A) Consider and determine whether the child's or youth's educational, physical, mental health, and developmental needs,

Angela M. (2003) 111 Cal.App.4th 1392, 1397–1398, in which the juvenile court was found to have abused its discretion in committing the minor to the California Youth Authority (now the Department of Juvenile Justice) without mentioning the issue of educational needs.

Appellant has forfeited this claim by failing to raise it in the trial court. (See *Scott, supra*, 9 Cal.4th at p. 354.) In any event, this case differs from *Angela M.*, in which the juvenile court was unaware of its duty to determine the minor's special education needs and failed to consider her psychological history. (*Angela M.*, *supra*, 111 Cal.App.4th at p. 1398.) Appellant, by contrast, had been given an IEP and his educational challenges were front and center at the various hearings in this case. The discussions of the court

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including any need for special education and related services, are being met; [¶] (B) Identify the educational rights holder on form JV-535; and [¶] (C) Direct the rights holder to take all appropriate steps to ensure that the child's or youth's educational and developmental needs are met. [¶] The court's findings and orders must address the following: [¶] (D) Whether the child's or youth's educational, physical, mental health, and developmental-services needs are being met; [¶] (E) What services, assessments, or evaluations, including those for developmental services or for special education and related services, the child or youth may need; [¶] (F) Who must take the necessary steps for the child or youth to receive any necessary assessments, evaluations, or services; [¶] (G) If the child's or youth's educational placement changed during the period under review, whether: [¶] (i) The child's or youth's educational records, including any evaluations of a child or youth with a disability, were transferred to the new educational placement within two business days of the request for the child's or youth's enrollment in the new educational placement; and [¶] (ii) The child or youth is enrolled in and attending school. [¶] (H) Whether the parent's or guardian's educational or developmental-services decisionmaking rights should be limited or, if previously limited, whether those rights should be restored. [¶] (i) If the court finds that the parent's or guardian's educational or developmental-services decisionmaking rights should not be limited or should be restored, the court must explain to the parent or guardian his or her rights and responsibilities in regard to the child's education and developmental services as provided in rule 5.650(e), (f), and (j); or [¶] (ii) If the court finds that the parent's or guardian's educational or developmental-services decisionmaking rights should be or remain limited, the court must designate the holder of those rights. The court must explain to the parent or guardian why the court is limiting his or her educational or developmental-services decisionmaking rights and must explain the rights and responsibilities of the educational rights holder as provided in rule 5.650(e), (f), and (j) [.] . . . .

and counsel make it clear they viewed the George Jr. Republic placement as one in which appellant's educational needs would be met. There is no suggestion the court failed to consider appellant's special educational needs when it selected that placement.

Absent from the record is the mandatory Judicial Council Form JV-535. Because the case is being remanded for other purposes as discussed below, we will direct the juvenile court to remedy this omission if it has not already done so.

D. *Custody Credits*

At the dispositional hearing on August 19, 2014, appellant was given credit for 633 days spent in custody. Appellant argues he was actually entitled to credits of 640 days at the time of disposition, in addition to days spent in juvenile hall post-disposition while awaiting transportation to George Jr. Republic. The People agree. (*In re J.M.* (2009) 170 Cal.App.4th 1253, 1256.) Because the record on appeal reflects only that appellant was scheduled for transport on October 6, 2014, but does not reflect when he actually left juvenile hall, the matter must be remanded for the court to calculate the appropriate credits.

E. *Maximum Period of Confinement*

Appellant argues the case must be remanded so the trial court can set his maximum term of physical confinement consistent with the sentencing limitations of Penal Code sections 1170.1 and 654. The People implicitly acknowledge the error.

Any order removing a ward from the custody of a parent must state a maximum term of physical confinement not to exceed the maximum term of imprisonment that could be imposed on an adult convicted of the same offense. (*In re Eddie M.* (2003) 31 Cal.4th 480, 488; § 726, subd. (d)(1).) If the court elects to aggregate the period of physical confinement on multiple counts, it must apply the "one-third of the middle term" limitation for subordinate counts under Penal Code section 1170.1, as well as proscription against multiple punishment set forth in Penal Code section 654. (*In re Asean D.* (1993) 14 Cal.App.4th 467, 474.)

When the trial court accepted appellant's admission to the robbery and burglary counts, it indicated his "maximum exposure" was 11 years (apparently reflecting the six-

year upper term for the first degree burglary and the five-year upper term for a second degree robbery, pursuant to Penal Code sections 461, subdivision (a) and 212.5 subdivision (a)(2)).[9] The probation report prepared for the dispositional hearing stated appellant's "maximum custody time" was 11 years, but the court did not set the maximum term of confinement in its dispositional order.

The 11-year figure, even if intended to reflect the maximum term of confinement, was incorrect. "It is settled law that [Penal Code] section 654 bars punishment for both burglary and robbery where the sole purpose of the burglary was to effectuate the robbery." (See *People v. Smith* (1985) 163 Cal.App.3d 908, 912.) The robbery and burglary count admitted by appellant arose from a single incident in which appellant entered a home with other juveniles and one of the juveniles took money from the homeowner at gunpoint. As the People acknowledged at oral argument, section 654 applies and the maximum term of confinement must be limited to six years for the burglary.

F. *Restitution Fine*

Appellant argues the $200 restitution fine imposed by the court under section 730.6, subdivision (b) must be reduced by $100, the amount attributable to the robbery

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[9] A robbery perpetrated inside an inhabited dwelling house is robbery of the first degree. (Pen. Code, § 212.5, subd. (a).) The upper term for first degree robbery is six years unless the defendant is found to have acted in concert, in which case the upper term is nine years. (Pen. Code, § 213, subd. (a)(1)(A) & (B).) The upper term for second degree robbery is five years. (Pen. Code, § 213, subd. (b).) The wardship petition charged appellant with "home invasion robbery in concert" but did not specify the degree of the offense, and appellant did not admit he committed the robbery in concert or in an inhabited dwelling house. Given that the trial court advised appellant his maximum punishment for the robbery allegation was five years before it accepted the admission, we construe appellant's admission as being to second degree robbery carrying a maximum term of five years. (See *In re Jonathan T.* (2008) 166 Cal.App.4th 474, 484 [punishment for robbery in concert improper when defendant did not admit in concert allegation]; Pen. Code, §§ 1157, 1192 [when no degree of crime specified, presumed to be of lesser degree].) At oral argument, both parties agreed the robbery admitted was of the second degree and the maximum term was five years.

conviction for which punishment must be stayed under Penal Code section 654. We agree. (*People v. Le* (2006) 136 Cal.App.4th 925, 934, 936.)

G. *Probation Conditions*

The juvenile court orally imposed the following probation condition regarding the possession and use of drugs and alcohol: "You're not to use, possess, or be under the influence of any alcoholic beverage or illegal or intoxicating substance or possess any paraphernalia."[10] It also imposed a condition requiring him to stay away from his victims and co-participants: "Minor to stay away from the victims [names omitted]. Minor not to have direct, indirect[t] or electronic contact with victims. [¶] Minor to have no direct, indirect or electronic contact with co-participants [names omitted]."

Appellant argues the drug and alcohol condition is unconstitutionally vague and overbroad because it did not contain a knowledge requirement and lacked an exemption for lawfully prescribed medications. (See, e.g., *People v. Rodriguez* (2013) 222 Cal.App.4th 578, 594–595 (*Rodriguez*) [remanding case so trial court could modify similar probation condition to include a knowledge requirement].) With respect to the stay-away conditions, appellant similarly challenges the absence of a knowledge requirement and additionally notes the court did not specify the distance he must maintain between himself and the victims. (*Ibid*.; see *People v. Barajas* (2011) 198 Cal.App.4th 748, 761–763 [probation condition prohibiting defendant from being "adjacent" to any school campus modified to prohibit being "on or within 50 feet of a school campus"].) Appellant did not object on these grounds in the trial court, but we may address the constitutionality of a probation condition for the first time on appeal if the issue may be resolved as one of law without reference to the sentencing record. (*Rodriguez*, *supra*, 222 Cal.App.4th at p. 585.)

Two cases involving the necessity of a knowledge requirement in similar situations are currently pending before our Supreme Court. (*In re A.S.*, review granted

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[10] The language contained in the minute order differs from the court's oral pronouncement. It is the oral pronouncement that governs. (*People v. Farrell* (2002) 28 Cal.4th 381, 384, fn. 2.)

Sept. 24, 2014, S220280; *People v. Hall*, review granted Sept. 9, 2015, S227193.) While awaiting guidance from our Supreme Court on this issue, we will continue to act on the side of caution and include the explicit—if perhaps unnecessary—requirement that probation violations be knowing. The challenged probation conditions shall be modified as noted in our Disposition.

H. *Miscellaneous Clerical Errors*

Appellant points to a number of minor clerical errors in the juvenile court's minute orders and reports. "A trial court has inherent power to correct clerical errors in its records so as to make these records reflect the true facts." (*People v. Little* (1993) 19 Cal.App.4th 449, 451.) "Where a remedy is available in a lower echelon of judicial administration, recourse to such should be required before the resort to appellate review." (*Id* at p. 452.) The correction of the clerical errors identified by appellant is the province of the juvenile court in the first instance and he may seek relief below.

III. DISPOSITION

The case is remanded to the juvenile court to recalculate the appropriate amount of credits under section 730.6, to prepare a Judicial Council JV-535 form pursuant to California Rules of Court, rule 5.651(b)(2), and to set forth appellant's maximum term of confinement as six years, taking section 654 into account.

The probation condition concerning drugs and alcohol is stricken and on remand should be modified to read: "Minor is not to knowingly use, possess or be under the influence of any alcoholic beverage or illegal or intoxicating substance unless prescribed by a physician, or possess any associated paraphernalia."

The probation conditions requiring appellant to stay away from the victims and his co-participants are stricken and on remand should be modified to read: "Minor shall not knowingly come within [specify distance] of [names of victims], their residences and their places of employment, and shall not knowingly have direct, indirect or electronic contact with [names of victims]. Minor shall not knowingly have direct, indirect or electronic contact with [names of co-participants]."

As so modified, the judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P.J.

SIMONS, J.

(A143339)